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**IN THE SUPERIOR COURT OF STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF YAVAPAI**

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|---|---|
| **STATE OF ARIZONA,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**STEVEN CARROLL DEMOCKER,**<br><br>**Defendant.** | **Cause No. P1300CR20081339**<br><br>**Division 6**<br><br>**STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL REQUEST REGARDING SANCTIONS DATED JUNE 10, 2010** |

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby responds to Defendant's Supplemental Request Regarding Sanctions dated June 10, 2010. The State incorporates its previous responses where applicable on the issues presented herein, and specifically its Response to Defendant's Motion to Strike the Death Penalty filed May 25, 2010.

**MEMORANDUM OF POINTS AND AUTHORITIES**

On May 14, 2010 Defendant filed his original request for sanctions regarding the evidence specific to this Supplement (see "Motion to Strike the Death Penalty or in the Alternative to Preclude Evidence and for Other Sanctions Based on Destruction of Biological Evidence, False Reporting of Biological Evidence Results and Defiance of this Court's Orders" filed May 14, 2010). The alleged disclosure violations set forth in this particular motion were

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that (1) the State failed to diligently conduct biological testing; (2) Sorenson Laboratory swabbed the handle bars and sides of the seat of Defendant's bicycle and consumed the swab without Defendant's knowledge or a Court order; and (3) an error was made in one of the Sorenson Laboratory reports which did not come to light until defense counsel interviewed the expert.

If the Court found that a discovery violation occurred, Defendant's requested relief was (1) dismissal of the death penalty; (2) precluding testimony about this testing on Defendant's bicycle; and (3) a *Willits* instruction on the consumptive testing. Id. at 11. Defendant stated that imposing a sanction of costs was insufficient for these alleged disclosure violations. Id. However, he stated that if the Court was inclined to consider imposing costs, Defendant wanted reimbursement for (1) all of Dr. Rudin's fees; (2) costs and expenses for counsel to prepare for and conduct the Sorenson interviews; (3) travel to Salt Lake City to perform the Sorenson interviews; and (4) counsel's time in litigating the issues. Id.

On May 25, 2010 the State responded that (1) the parties and the Court are aware that a number of items have been biologically tested over the last several weeks, some pursuant to Court order; (2) the State authorized Sorenson Laboratory to conduct consumption testing of one bicycle swab but there remained hundreds of places available on the bicycle for serology testing; and (3) the error in the Sorenson Laboratory report was exculpatory and Defendant was not prejudiced by the error.

On May 26, 2010 the State withdrew its allegation of the death penalty.

A hearing was held on May 28, 2010 on the motion for sanctions. The Court found that the consumption of the swab without first notifying the defense or obtaining permission of the Court was in violation of the Court's previous order. TR 5/28/10 at 19. The Court held that

such consumption was a discovery violation and precluded the use of that testing in trial. Id. The Court did not find any late disclosure violation or that the error in the lab report was sanctionable. Id. at 19-20. The Court took Defendant's request for financial sanctions under advisement. Id. at 20. The instant Supplement and this Response are directed to the matter of financial sanctions.

A. Defendant did not believe monetary sanctions were appropriate under the circumstances.

In the event the Court found a discovery violation by the State, Defendant's first requested sanction was a dismissal of the death penalty. (5/14/10 Motion at p. 11) The State on its own motion did withdraw the death penalty allegation. Defendant's second request was that any reference to the bicycle testing be precluded. The Court ordered that the test results were precluded. Defendant's third request was that a *Willits* instruction be given regarding the consumption of the swabs. All evidence from the bicycle has not been lost and is available for Defendant's use if he so desires. A *Willits* instruction is not appropriate. Defendant stated that imposing sanctions of costs was an insufficient sanction for any disclosure violation. However, after getting exactly what he wanted for the one found violation, he now wants more.

B. Defendant now wants $50,000 in monetary sanctions for the consumption of a bicycle swab that could be recreated by Defendant's expert at any time.

For the Court's convenience, set forth below is the applicable portion of the State's Response regarding the consumption of the bicycle swab.

> According to an interview of administrative lead, Dan Hellwig of Sorenson Laboratory conducted on May 24, 2010, the subject bike was delivered to them on or about February 17, 2010 by Captain Rhodes. On February 18, 2010 a meeting involving Captain Rhodes, Dan Hellwig and Carma Smith was held and memorialized in case notes from the Sorenson file. Although the bike was now in the custody of Sorenson Laboratory, no

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decision was made at this time to conduct DNA testing on it. ... In fact, according to Mr. Hellwig's recent interview, he did not believe any further testing was going to be conducted on the bike.

On or about March 31, 2010 a serology test consisting of the swabbing of the handle bars and the sides of the bike seat was done. This swabbing was done outside of the presence of defense's observer Norah Rudin. Mr. Hellwig stated there was no attempt to keep the serology test from Ms. Rudin. He explained that since they were not conducting consumption testing of the swabs from the bike, it did not fall under the underlying court order. He stated the serology test done on specific areas of the bike was done so he could return the large evidence item bike back to Captain Rhodes. Captain Rhodes was at the Sorenson Laboratory as the State's observer while the consumption testing was been conducted. Captain Rhodes had no involvement in the Sorenson Laboratories decision to perform a serology on the bike.

The swab from the bike was stored in Sorenson's freezer. On or about April 8, 2010 the State authorized Sorenson Laboratory to conduct consumption testing of the swab for possible Y-STR DNA. The DNA tests on the swab were not conducted in secret nor were they conducted while Norah Rudin was at the lab.

While the individual swab was consumed, not all areas of the handlebars or the seat or all of the other surfaces of the bike were swabbed for biological material. If it is Defendant's claim that he is somehow precluded from conducting independent DNA testing on the bike because the State consumed the one swab, this contention is without merit. There are literally hundreds of places available on this bike for serology testing.

Ms. Rudin's purpose was to observe testing on swabs **where all the biological material available would be consumed**. Clearly, this is not the case with the bike. Obviously, Defendant's claim that the State consumed all of the biological evidence from Evidence Item 400 (Defendant's mountain bike) in defiance of the Court's Order is untrue.

5/25/10 Response at pp. 3-4 (emphasis added).

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In this Supplement, Defendant requests $49,230.31 in monetary sanctions which he alleges flows from the one discovery violation found by the Court. His argument cannot be viewed in good faith.[1]

Defendant requests reimbursement of $7,070.46 for the costs associated with defense observer Norah Rudin to travel to Salt Lake City and observe scientific testing which involved the consumption of the collected evidence. As noted on page 6 of Defendant's May 14, 2010 Request for Sanctions, Dr. Rudin was present for three days of DNA testing at the Sorenson Laboratory in Salt Lake City commencing March 30, 2010. He specifically states that "[m]any items of evidence were examined during these days ... including the fingernails, the telephone, the door handle, hair from the victim's shorts, etc." Id. at lines 15-18. Defendant shamelessly requests full reimbursement for all of Dr. Rudin's expenses even though she performed all of the obligations for which she was hired. Dr. Rudin did not travel back to the Sorenson Lab to observe the consumption of the bicycle swab which was performed days after she left Salt Lake City. No additional costs were incurred by Dr. Rudin due to the consumption.

Defendant also requests to be reimbursed $40,143.00 for 99.1 hours ($405.00 per hour) spent on trial preparation interviews of the Sorenson Laboratory employees and experts. Defendant admits that the time spent included time spent with defense experts, review of Sorenson materials, preparation for interviews and travel. Defense counsel would have incurred that time whether or not the State mistakenly authorized Sorenson Laboratory to

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[1] **Good faith**. Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. Black's Law Dictionary, Abridged Fifth Edition, 1983, West Publishing Co.

consume the swab of the bicycle. Similarly, the $2,036.85 incurred in travel expenses for these two attorneys would have been expended in any event.

C. The maximum monetary sanction available under the facts is a small fraction of that requested.

If Defendant is entitled to monetary sanctions, it should be limited to the approximate 15 minutes to one-half hour one defense counsel spent interviewing the Sorenson employees regarding their decision to obtain the swab and the State's authorization to consume it. It is noted that at no time did the State attempt to "hide the ball" from Defendant and no fees can be associated with trying to "get to the bottom" of the matter.

In *State v. Meza*, 203 Ariz. 50, 50 P.3d 406 (App. 2003) the defendant was entitled to restitutionary monetary sanctions to alleviate costs undertaken due to discovery violations. The defendant was entitled to certain costs because a state expert intentionally gave false testimony regarding the deletion of ADAMS database results for the calibration checks of the Intoxilyzer 5000 machine used to determine the defendant's alcohol concentration. The expert claimed that he was unaware that test results could be deleted from the ADAMS database, when he in fact had personally deleted several such results. 203 Ariz. at 52, ¶ 5, 50 P.3d 409. The Court of Appeals found that it was "apparent that hundreds of hours of time, with commensurate costs, were wrongfully thrust upon [the defendant] and his counsel by the State" for failing to disclose the deleted test results. 203 Ariz. at 58-59, ¶ 38, 50 P.3d at 415-16. The case was remanded "with instructions to the trial court to assess, as an additional discovery sanction, the reasonable costs and fees that the defense has incurred as a consequence of the sanctionable conduct of the State." 203 Ariz. at 59-60, 50 P.3d at 416-17.

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In this case, Defendant requests reimbursement for fees and costs not associated with the State's authorization to consume a swab. Rather, he requests reimbursement for all costs associated with an effective defense attorney's normal obligations to review evidence and interview experts prior to trial. His request for $50,000.00 based upon the facts of this case is unconscionable, lacks in good faith, and is sanctionable conduct in and of itself.

**CONCLUSION**

The State's authorization of the consumption of the bicycle swab was not done to obtain any advantage over Defendant. There remained hundreds of places available on the bicycle for serology testing. If it was done in violation of the Court's order, it was unintentional.

Nevertheless, the Court did find that the State violated its previous order, and the State accepts its order precluding it from introducing evidence of the testing if the trial continues as scheduled.

The $50,000 Defendant requests in monetary sanctions for consumption of the swab, however, bears no relationship to the found discovery violation. Defendant's request should be denied without further argument.[2]

RESPECTFULLY SUBMITTED this 21st day of June, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: Dennis M. McGrane
Dennis M. McGrane
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[2] Should the Court determine monetary sanctions are appropriate, a hearing will need to be held to determine to whom the money should be paid as it is believed that the taxpayers of Yavapai County are paying defense attorney fees at this point in time.

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COPIES of the foregoing delivered this 21st day of June, 2010 to:

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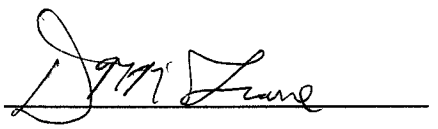
By: 

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